Overseas Union Bank (M) Bhd v L & L Properties Sdn Bhd

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 24–911 OF 1998
CLEMENT SKINNER JC
30 APRIL 1999

Land Law *— Statutory notice of default — Service of — Whether premature — Whether period for repayment stated in notice of demand and not Form 16D relevant — Basis of determination*

Civil Procedure *— Affidavits — In support for application for order for sale — Plaintiff only stated balance of principal loan amount — Whether amount of advance and amount of repayments must be stated — Whether affidavit must comply with O 83 r 3 of Rules of the High Court 1980*

The plaintiff had been providing overdraft facilities to the defendant between 1994 to 1998. The overdraft was secured by debentures and charges over 18 pieces of land belonging to the defendant. Over a period of time, the defendant redeemed 14 of the 18 pieces of lands. On 17 July 1998, the plaintiff attached a notice of demand to the front door of the defendant's premises which required the defendant to repay the outstanding amount of RM557,215.28 within seven days. The plaintiff considered the defendant to have conducted or operated its overdraft account in an unsatisfactory manner and in breach of the terms of the borrowing. When the plaintiff did not receive payment as demanded, it sent to the defendant a Form 16D statutory notice of default dated 5 August 1998 pursuant to s 254 of the National Land Code 1965 ('NLC'). This notice required the defendant to pay the above mentioned sum within 14 days failing which an order for sale would be applied for. No payment was received from the defendant and the plaintiff filed its application for sale on 21 September 1998. The defendant opposes this application on two grounds: (i) the whole action is premature as the Form 16D statutory notice was issued prematurely; and (ii) there has been non-compliance with O 83 of the Rules of the High Court 1980 ('the RHC').

Held, dismissing the application with costs:

(1) The question of whether the Form 16D has been issued prematurely must be determined by looking at the period for repayment stated in the notice of demand and not in the Form 16D notice. The seven days stated in the plaintiff's notice of demand served on 17 July 1998 had lapsed on 24 July 1998 and once that happened, the plaintiff had every right to issue the Form 16D notice and serve it on the defendant. Further, an examination of the Form 16D issued shows that the plaintiff has complied with the statutory requirements in s 254 of the NLC (see p 643A–B).

(2) The plaintiff has not complied with the statutory requirements of O 83 r 3(3) of the RHC. The amount of the advance and the amount of the repayments must be stated but the plaintiff has only stated the balance of the principal loan amount. As there was an absence of particulars of the amount of repayments, the plaintiff's contention that its affidavits disclose sufficient material to show how the debt came about and what was owed under the charge cannot be supported. The plaintiff's non-compliance does not afford the defendant the opportunity to determine the exact sum it was to pay, and the court cannot with any measure of confidence say what was the total amount due to the plaintiff. The defendant was not precluded from pointing out this non-compliance to show cause against the making of an order for sale just because the defendant had written to the plaintiff proposing terms of repayment (see pp 644G–645E).

[Bahasa Malaysia summary

Plaintif telah memberikan kemudahan overdraf kepada defendan antara 1994 hingga 1998. Overdraf tersebut telah dijamin oleh debentur dan gadaian terhadap 18 bidang tanah milik defendan. Dalam satu tempoh masa, defendan telah menebus 14 daripada 18 bidang tanah. Pada 27 Julai 1998, plaintif telah menampal suatu notis tuntutan di hadapan pintu premis defendan yang memerlukan defendan untuk membayar jumlah yang masih berhutang berjumlah RM557,215.28 dalam masa tujuh hari. Plaintif telah berpendapat defendan telah mengendalikan dan operasikan akaun dengan cara yang tidak memuaskan dan memecah terma pinjaman. Apabila plaintif tidak menerima pembayaran seperti yang dituntut, ia telah menyerah kepada defendan suatu notis keingkaran berkanun Borang 16D bertarikh 5 Ogos 1998 menurut s 254 Kanun Tanah Negara ('KTN'). Notis ini memerlukan defendan untuk membayar jumlah di atas dalam masa 14 hari di mana kegagalan akan menyebabkan perintah penjualan akan dipohon. Tiada pembayaran telah diterima daripada defendan dan plaintif telah memfailkan permohonan untuk menjual pada 21 September 1998. Defendan telah menentang permohonan tersebut atas dua alasan: (i) keseluruhan tindakan adalah pra-masa oleh kerana notis berkanun Borang 16D telah dikeluarkan secara pra-masa; dan (ii) terdapat ketidakpatuhan A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT tersebut').

Diputuskan, menolak permohonan dengan kos:

(1) Persoalan sama ada Borang 16D telah dikeluarkan secara pra-masa mestilah ditentukan dengan melihat kepada tempoh pembayaran balik yang dinyatakan di dalam notis tuntutan dan bukan di dalam Borang 16D. Tujuh hari yang dinyatakan di

dalam notis tuntutan plaintif yang diserahkan pada 17 Julai 1998 telah luput pada 24 Julai 1998 dan selepas ini berlaku, plaintif mempunyai semua hak untuk mengeluarkan notis Borang 16D dan menyerahkannya kepada defendan. Selanjutnya, suatu pemeriksaan Borang 16D tersebut yang dikeluarkan menunjukkan bahawa plaintif telah mengikut segala peruntukan statutori di dalam s 254 KTN (lihat ms 643A–B).

(2) Plaintif tidak mematuhi keperluan statutori A 83 k 3(3) KMT. Jumlah yang diberikan dan juga jumlah pembayaran balik mestilah dinyatakan tetapi plaintif hanya menyatakan baki prinsipal pinjaman. Oleh kerana terdapat ketiadaan butiran mengenai jumlah pembayaran balik, penegasan plaintif bahawa afidavit mendedahkan bahan yang mencukupi untuk menunjukkan bagaimanan hutang timbul dan apa yang dihutang di bawah gadaian tersebut tidak boleh disokong. Ketidakpatuhan plaintif tidak memberikan defendan peluang untuk menentukan jumlah tepat yang patut dibayar, dan mahkamah tidak boleh dengan sebarang ukuran keyakinan berkata apa yang masih belum dijelaskan kepada plaintif. Defendan tidak dikecualikan daripada menimbulkan ketidapatuhan ini untuk menunjukkan sebab menentang pemberian perintah penjualan hanya kerana defendan telah menulis kepada plaintif untuk mencadangkan terma pembayaran balik (lihat ms 644G–645E)].

Notes

For a case on service of statutory notice of default, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 2825.

For a case on whether affidavit must comply with O 83 r 3 of the Rules of the High Court 1980, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 266.

Cases referred to

Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd [1993] 1 MLJ 283 (refd)

Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608 (refd)

Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd [1998] 2 MLJ 440 (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)

Legislation referred to

National Land Code 1965 ss 254, 256, 257(1)(c)

Rules of the High Court 1980 O 83, r 3, (3), (a), (c), (7)

A Selvanathan (*Kean Chye & Sivalingam*) for the plaintiff.

Awtar Singh Gill (*Awtar Ghazali Augustine & Co*) for the defendant.

Clement Skinner JC: This is an application by the plaintiff, a bank, to enforce its statutory charge by way of an order for sale of four pieces of land namely:

HS (D) KA 28872 PT No 124803
HS (D) KA 28889 PT No 124880
HS (D) KA 28890 PT No 124881
HS (D) KA 28895 PT No 124886

all in the Mukim of Ulu Kinta, District of Kinta, Perak ('the said lands') owned by the defendant and which were charged to the plaintiff in circumstances described below.

On 12 April 1994, the plaintiff pursuant to a request from the defendant offered the latter overdraft facilities ('OD') of RM475,000 in consideration whereof the defendant on 21 April 1994 executed a first debenture and first charge over 18 pieces of land, including the said lands. The charge was registered vide presentation No 14297/94 Vol No 5624 Folio No 21.

About a year later, at the request of the defendant, the plaintiff on 31 January 1995 granted the defendant additional OD facilities in the sum of RM728,000 in consideration of which the defendant on 16 January 1995 executed a second debenture and second charge over the 18 pieces of land above mentioned. This second charge was registered vide presentation No 929/95 Volume No 6078, Folio No 15. The total OD facilities granted to the defendant therefore amounted to RM1,203,000.

By a letter of offer dated 8 July 1995, the plaintiff continued to offer the defendant OD facilities but in a varied amount, limited to RM1,021,000. The OD continued to be secured by the existing debentures and charges.

Over a period of time the defendant redeemed 14 of the 18 pieces lands charged to the plaintiff and in that process the plaintiff reduced the OD limit to RM525,500 which sum remains secured by the said lands. The plaintiff says the defendant has conducted or operated its overdraft account in an unsatisfactory manner and in breach of the terms of the borrowing.

Accordingly, on 30 June 1998, the plaintiff caused to be sent to the defendant, a demand to repay the outstanding amount of RM557,215.28 as at 26 June 1998 within seven days from the date thereof. This demand was served by the plaintiff's solicitors on the defendant at two different addresses employing three methods, namely by AR Registered post and by Certificate of Posting addressed to the defendant at:

(i) 487-B Jalan Pasir Puteh,
31650 Ipoh ('the Pasir Puteh address');
(ii) No 112-1, First Floor, Jalan Kampar,
30250 Ipoh ('the Jalan Kampar address').

The plaintiff's solicitors also caused to be attached to the front door of the premises at the Pasir Puteh address the notice of demand on 17 July 1998.

A The Pasir Puteh address was given by the defendant as the address of its registered office in the first charge. When the defendant executed the second charge, it gave the Jalan Kampar address as the address of their registered office and the Pasir Puteh address as its place of business.

When the plaintiff did not receive repayment as demanded, it caused to be sent to the defendant a statutory notice of default in Form 16D pursuant B to s 254 of the National Land Code ('NLC'). This Form 16D notice dated 5 August 1998 was again sent to the defendant at its Pasir Puteh and Jalan Kampar addresses by the plaintiff's solicitor employing the three above mentioned methods.

The Form 16D notice sent to the defendant requires it to pay the sum C of RM557,215.28 within 14 days from the date of service failing which an order for sale would be applied for. When no payment was received from the defendant, the plaintiff filed its application for sale herein on 21 September 1998.

In the affidavit of Saw Ki Liong affirmed on 21 September 1998 D ('plaintiff's first affidavit') in support of their application, the plaintiff has indicated the status of the defendant's account by giving particulars of the amount owing. In para 13, the plaintiff begin by stating the 'Balance of Principal Loan Amount' (as at 12 November 1997) as RM525,500 and then adding accrued interest as at 31 August 1998 thereby making a total sum owing of RM578,156.41.

E After the filing of the originating summons herein, the plaintiff filed a corrective affidavit to amend the OD figure from RM1,023,000 to RMl,203,000 the first figure having been wrongly typed. I find nothing turns on this amendment which was obviously necessitated by a typing error.

The defendant opposes this application for sale and have filed two F affidavits to show cause against the making of an order for sale. Several matters are raised therein but when this application was heard, Mr Awtar Singh, learned counsel for the defendant stated that the defendant intends to show cause to the contrary on two grounds:

(i) this whole action is premature as the statutory notice in Form 16D G was issued prematurely;

(ii) there has been non-compliance with O 83 Rules of the High Court 1980 ('the RHC').

Is the whole action premature

H It is the defendant's case that when the plaintiff sent its demand for repayment to the defendant by AR Registered post and Certificate of Posting to their Pasir Puteh address, the AR Registered letter was returned 'unclaimed'. As such there was no demand on the defendant by this method. In respect of the AR Registered letter sent to the Jalan Kampar address, this was acknowledged by someone other than the defendant, I namely 'CWC Services & Trading'. It is counsel's submission that since the plaintiff had already done a search on the defendant at the Registrar of Companies before they sent out their demand, this search would have

revealed that the defendant had given its principal place of business as well as its registered address as their Pasir Puteh address. In these circumstances, submits counsel, the plaintiff must have been aware of the change of the defendant's principal place of business and therefore the demand served at the defendant's Jalan Kampar address is bad. In support of his contention counsel cites the case of *Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd* [1998] 2 MLJ 440.

Counsel for the defendant then goes on to say that when the plaintiff attached the notice of demand to the door of the premises at their Pasir Puteh address on 17 July 1998, that constituted good service of the demand for repayment in accordance with the annexure of charge.

Counsel then referred to the Form 16D which is dated 5 August 1998 and to para 3 thereof which reads:

> And whereas the breach has continued for a period of at least one month prior to the date of this notice

Counsel submits that the word 'prior' in the above paragraph must refer to the notice of demand served on 17 July 1998 and since para 3 speaks of the breach continuing for at least one month prior to the notice, that one month would only expire on 16 August 1998. As the form 16D was dated 5 August 1998, it has been served prematurely wherefore this whole action being founded on the Form 16D is bad. It is counsel's submission that even though the terms of the charge requires that the plaintiff only gives the defendant seven days from date of demand to repay, since the Form 16D mentions 30 days, the plaintiff is bound to honour the same.

I regret I do not regard the reasons advanced above as showing cause to the contrary and say so for the following reasons.

Firstly, the notice of demand served on the defendant on 17 July 1998 gave the defendant seven days and not 30 days to repay. The letter of demand could not be expressed in clearer terms and ends in this way:

> Our client *hereby demand* payment of the said sum of RM557,215.76 with interest as aforesaid within seven (7) days from the date hereof.
>
> *Take Notice* that if payment is not made within the time herein stated our client will have no alternative but to take such steps as it may be advised pursuant to the Debenture dated 20 May 1994 and 16 January 1995.
>
> *And Further Take Notice* that our client will also apply to court for an order of sale by public auction of the properties charged to it by you for the above Account.

Secondly, s 254 specifies what matters must be stated in the Form 16D notice. They are:

(1) the breach in question should be specified;

(2) the notice must require that breach to be remedied within 1 month of the date of notice of service of the notice or such other period as may be specified in the charge;

(3) a warning that if the chargor fails to comply with the notice, proceedings will be taken to obtain an order for sale of the property charged.

An examination of the Form 16D issued in this case shows that the plaintiff has complied with the statutory requirements in s 254 in that the notice identifies the breach as being the defendant's failure to comply with the notice of demand dated 30 June 1998, that the defendant is given 14 days from service of the notice to remedy that breach failing which an application for an order of sale will be made.

In my judgment, the seven days stated in the plaintiff's notice of demand served on 17 July 1998 had elapsed on 24 July 1998. Once that happened, the plaintiff had every right to issue the Form 16D notice and serve it on the defendant. In my view, the fact that the Form 16D notice contains a statement that the breach complained of has continued for a period of one month prior to the date of the notice does not vitiate the same or render it bad as being premature, because the question of whether the Form 16D has been issued prematurely must be determined by looking at the period stated in the notice of demand for repayment and not in the Form 16D notice as suggested by the defendant. When that is done, it will be seen that the question of prematurity does not arise.

Was there non-compliance with O 83 RHC

It is the submission of counsel for the defendant that the plaintiff has not compiled with O 83 r 3(3) RHC which requires that the plaintiff show in its affidavit the state of the account between the plaintiff and defendant by providing particulars of:

(a) the amount of the advance;

(b) the amount of the repayments;

(c) the amount of any interest or installments in arrears at the date of issue of the originating summons and at the date of the affidavit;

(d) the amount remaining due under the charge.

Counsel submits that in its affidavit affirmed on 30 November 1998 (plaintiff's second affidavit), the plaintiff has given the following particulars of account:

Pinjaman Wang Pokok ... RM525,500

Counsel says that this particular is incorrect because O 83 r 3(3)(a) requires 'the amount of the advance' to be stated. In this case, the principal amount borrowed is some RM1.2m. Counsel says the plaintiff should have stated the actual amount advanced, then they should have shown repayment on 14 of the 18 titles that have been redeemed but there are no particulars of these repayments whereas it is clear from cl 39 of the anexure of the second charge that until a demand for repayment is made, the defendant would repay the facility by 36 monthly installments of RM27,000 each or by redemption sums of RM108,600 to RM205,000 per title deed. Because the plaintiff has failed to particularize the amount of repayments, the defendant does not know at what sums the 14 titles were redeemed. In support counsel refers to *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283 where it was held that non-compliance with O 83 r 3(3)(c) and (7) deprived the defendant of knowledge of the exact

amount outstanding and interest due under the charge which rendered the order for sale liable to be set aside. A

Counsel for the defendant goes on further to point out that in the plaintiff's affidavit affirmed on 26 January 1999, (plaintiff's third affidavit) para 10 thereof acknowledges that the defendant has paid off a temporary overdraft of RM50,000 on 17 February 1995. Counsel says this should have been shown as a repayment but was not. Counsel then cites the case of *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 where it was held that it is incumbent on a plaintiff to provide the statutory particulars mentioned in O 83 r 3(3) RHC. B

In reply to these complaints, Mr Selvanathan, learned counsel for the plaintiff submits that the defendant's insistance on compliance with O 83 r 3(3) is unjustified as the court is not to concern itself with whether a proper account of the money paid by the defendant to the plaintiff has been given and cites in support the case of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 at p 88H where it is stated that a judge hearing an application under s 256 should not concern himself with matters such as whether or not a proper account has been given of sums paid by a borrower. C D

Counsel for the plaintiff submits that O 83 r 3(3) will be procedurally complied with if the affidavits in court disclose sufficient material to show how the debt came about and what is owed under the charge. Counsel then refers to the various affidavits filed by the plaintiff to show how this is achieved. First counsel refers to the plaintiff's first affidavit where it is stated in para 6 that the total OD facility was RM1,203,000 (after correction). Paragraph 8 then states that the OD was reduced to RM525,500 by the redemption of 14 titles. There was thus a means by which the defendant was able to discern and calculate the amounts repaid. In addition, statements of accounts have been rendered to the defendant which has never been queried before. Above all, the plaintiff says the defendant really have no complaint regarding the state of their account, which has been in operation since 1994, because after these proceedings were commenced on 21 September 1998, the defendant wrote to the plaintiff on 8 January 1999 (exh SKI 7 of encl 13) making proposal for settlement of the debt. This, submits counsel for the plaintiff, is open admission of the debt and the inability of the defendant to pay the outstanding debt. E F G

Having considered these competing submissions, I find that the plaintiff has not complied with the statutory requirements of O 83 r 3(3). The sub-rule is quite explicit as to what particulars have to be stated in an affidavit supporting an application for sale. The 'amount of the advance' and the 'amount of the repayments' must be stated. The plaintiff has stated the 'balance of principal loan amount' which in my opinion is quite different from the amount advanced. Secondly, there is a complete absence of any particulars of repayment in all the affidavits of the plaintiff. The plaintiff says in para 8 of the affidavit of Saw Ki Liong affirmed on 21 September 1998 that there have been repayments but has not provided any particulars of the amount of such repayment. In the absence of stating an amount representing the sums repaid, the plaintiff's submission that their affidavits H I

disclose sufficient material to show how the debt came about and what is owed under the charge cannot be supported. I would point out here that whilst counsel for the defendant seems to suggest that the plaintiff must give full particulars of the repayments made by itemizing each of them, I do not think O 83 r 3(3) imposes any such obligation on the plaintiff. To comply, the plaintiff needs to state the amount repaid.

Whilst I agree with learned counsel for the plaintiff that if there has been substantial compliance with O 83 RHC the court can exercise discretion to excuse minor omissions if no real prejudice would result to the defendant, as advocated by Mahadev Shankar J in *Citibank NA v Ibrahim Othman*, I find that I cannot regard the omissions here as minor because even if it can be gathered from the affidavits that the amount of the advance was RM1,203,000, without having stated the amount of repayments made, the objective of O 83 r 3 RHC, namely, 'to enable the defendant to know at least by the date the originating summons is filed, what is the exact sum he is legally liable to pay so that he can make up his mind to contest or pay up', is not achieved (see *Citibank NA v Ibrahim Othman* at pp 608I, 614H–I). Now that the defendant disputes the true state of its owing, the non-compliance of the plaintiff with O 83 r 3(3) does not afford it the opportunity to determine the exact sum it is to pay. Similarly, if an order for sale is to be made, the court cannot with any measure of confidence say precisely what 'the total amount due to the chargee at the date on which the order is made', is which is a mandatory requirement of s 257(1)(c) NLC as pointed out in *Citibank NA v Ibrahim bin Othman*. I do not think that just because the defendant has written to the plaintiff proposing terms of repayment that the defendant is precluded from pointing out the non-compliance with O 83 to show cause against the making of an order for sale.

I accept, as I am bound to, the statement made in *Low Lee Lian*'s case that the court is not to concern itself on an application of this nature with whether the plaintiff has given a proper account of the money paid by the defendant, but it is also stated in that same judgment that a judge hearing an application under s 256 must ensure that the procedural requirements prescribed by O 83 of the RHC have been compiled with.

In the result, the defendant has shown cause to the contrary on this ground, I order that the plaintiff's application be dismissed with costs.

Plaintiff's application dismissed with costs.

Reported by Joel Ng